No. 4388

United States
Circuit Court of Appeals
For the Ninth Circuit

KARL EMERZIAN, Plaintiff in Error,

vs.

S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Defendant in Error.

Petition by Plaintiff in Error for Rehearing After Judgment Affirming Judgment of United States District Court for the Southern District of California, Northern Division

GEO. COSGRAVE,
and
L. B. HAYHURST,
Attorneys for Plaintiff in Error.

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S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation,
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PETITION BY PLAINTIFF IN ERROR FOR REHEARING AFTER JUDGMENT AFFIRMING JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

To the United States Circuit Court of Appeals, Ninth Circuit:

Plaintiff in error respectfully presents to this Court his petition for rehearing, and asks that the judgment affirming the decision of the United States District Court for the Southern District of California, northern division, be reconsidered.

The decision of the District Court was affirmed because there was no stipulation in writing waiving a jury filed by the clerk, as required by Section 649 of the Revised Statutes. Plaintiff in error respectfully submits that the record is entirely sufficient

in this respect and shows in legal effect that such stipulation was filed. Its absence will not, of course, be presumed, since all presumptions are in favor of the regularity of the proceedings in the lower court. It is respectfully submitted that it does not affirmatively appear that a written stipulation was not in existence, but upon the contrary it does appear that the stipulation is in existence. The findings of the trial court (Tr. p. 25) recite:

> "This cause came on regularly for trial on the 28th day of January, 1924, before the court without a jury, a jury trial having been duly waived by the parties", etc., etc.

The judgment (page 29) contains nothing to the contrary; the recital being that

> "a jury trial having been waived by the parties" * * *

Now we respectfully submit that if the record shows that the trial by jury was in fact *duly* waived, this court is bound to presume that the waiver was in writing, nothing to the contrary appearing in the record. That if the trial by jury were *duly* waived, it necessarily follows that it was waived in such manner as the law requires. The word "duly" is thus defined:

> "The word has acquired a fixed legal meaning and when used before any word

> implying action, it means that the act was done properly, regularly, and according to law, or some rule of law. It does not relate to form merely, but includes form and substance, and implies the existence of every fact essential to perfect regularity of procedure."
>
> 19 C. J. 833.

The question at issue seems to be governed by two statutory provisions. Section 566, Revised Statutes, provides that:

> "The trial of issues of fact in the district courts, in all causes except in equity and cases of admiralty and maritime jurisdiction and except as otherwise provided in proceedings in bankruptcy, shall be by jury * * *"
>
> 6 Fed. Stats. Ann., 2d ed. p. 121.
> 3 U. S. Comp. Stats. 1916, 1583.

It is further provided, (649 Revised Statutes):

> "Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."
>
> 6 Fed. Stats. Ann., 2d ed., p. 130.
> 3 U. S. Comp. Stats. 1916, 1587.

By the positive provisions of the statute, there is only one way in which the jury can be waived, namely, by written stipulation. When the trial court finds that this waiver was *duly* made it conclusively follows that it was made in writing because that is the only way that, according to the definition quoted, *"implies the existence of every fact essential to perfect regularity of procedure"*. There being nothing in the record to show that this was not done, but the record affirmatively showing that the waiver was duly made, it necessarily follows that it sufficiently appears from the record that the waiver was made as required by law.

There is a striking and noticeable difference between the record in the case at bar and that in other cases where the point is to some extent considered.

In Ford vs. U. S. 260 Fed Rep. at page 658, the recital in the judgment was:

> "and now both parties announce themselves ready for trial, and waive jury and agree to try the case before the court." (658)

Madison County vs. Warren, 106 U. S. 622, 27 L. Ed. 311, says:

> "The rule is well settled that if a written stipulation waiving a jury is not *in some way* (our italics) shown affirmatively in the record, none of the questions decided at the trial can be re-examined here on writ of error."

In Bond vs. Dustin, 28 L. Ed. 835, decided by the United States Supreme Court, the record showed:

> "and the issue joined by consent is tried by the court, a jury being waived".

The Bill of Exceptions recited:

> "The above case coming on for trial, by agreement of parties, by the court without the intervention of a jury"

The decision goes on to say:

> "The most proper evidence of a compliance with the statute is a copy of the stipulation in writing filed with the clerk. But the existence of the condition upon which a review is allowed is sufficiently shown by a statement in the findings of fact by the court, or in the bill of exceptions, or in the record of the judgment entry, that such stipulation was made in writing." (836)

In defining the word *duly* we have confined ourselves to Corpus Juris, but no other authority essentially differs, and Corpus Juris is the latest. Applying the language of the court in Bond v. Dustin, supra, we maintain that the record in this case showing without contradiction that a jury trial was *duly* waived not merely *sufficiently* but *conclusively* shows the existence of the condition on which a review is allowed.

The waiver is shown as stated in Madison County v. Warren, supra, "affirmatively in some way".

Defendant in error has not objected to a review.

We respectfully contend therefore that the finding of the trial court that the jury was duly waived is conclusive on this court, and it conclusively follows that it was waived in the only manner allowed by law, and that the appeal should therefore be considered on its merits; that the plaintiff in error should have his "day in court" before the Circuit Court of Appeals.

GEO. COSGRAVE,
and
L. B. HAYHURST,
Attorneys for Plaintiff in Error.

STATE OF CALIFORNIA, }
County of Fresno. } ss.

I, Geo. Cosgrave, of Fresno, California, hereby certify that I am one of counsel for plaintiff in error in the foregoing petition for re-hearing. That in my judgment the said petition for re-hearing is well founded. That it is not interposed for delay.

Dated: March 9, 1925.

Geo. Cosgrave